



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: July 13, 2007

CBCA 694

CHARLES T. OWEN,

Appellant,

v.

AGENCY FOR INTERNATIONAL DEVELOPMENT,

Respondent.

Charles T. Owen, pro se, American Embassy, Bogota, Colombia.

Warren D. Leishman, Office of the General Counsel, Agency for International Development, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **DRUMMOND**, and **KULLBERG**.

DANIELS, Board Judge.

We dismiss this case for lack of jurisdiction because it was filed more than ninety days after the contractor received the contracting officer's decision which is the subject of the appeal.

Background

The United States Agency for International Development (USAID) entered into a personal services contract with Charles T. Owen. For more than two years, it paid Mr. Owen, for services he provided under the contract, at a rate equivalent to the salary of a federal employee at the GS-15 step 10 level. USAID then determined that it should have

been paying Mr. Owen at a rate equivalent to the salary of a federal employee at the lower GS-15 step 1 (and later step 2 and still later step 3) level. On October 24, 2006, the agency sent him a “letter of demand.” In this letter, the agency required Mr. Owen to repay \$74,497.83, which it calculated to be the difference between what he was paid and what he should have been paid under the contract. Mr. Owen responded by asking USAID to give him “compassionate consideration” by waiving its claim to this money.

On November 16, 2006, a USAID contracting officer issued to Mr. Owen a decision on the matter. She wrote, “It is my final determination that your request for full or partial relief from the debt of \$74,497.83 does not dispute the existence of an overpayment or USAID’s basis for seeking repayment; accordingly, repayment is required.” The contracting officer informed Mr. Owen that he could appeal her decision to “the agency board of contract appeals.” “If you decide to appeal,” she wrote, “you must, within ninety days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to my attention as Contracting Officer.” The contracting officer also told Mr. Owen that instead of filing an appeal, he could bring an action in the United States Court of Federal Claims within twelve months of the date he received the decision.

Mr. Owen received the contracting officer’s decision on November 16, 2006.

Mr. Owen sent a letter dated February 9, 2007, to Thomas Clarkson, a division chief in USAID’s Central Accounting and Reporting office. The letter is styled a “formal[] appeal” of the agency’s October 24, 2006, letter of demand. It asks Mr. Clarkson to make a “studied review of the attached appeal and supporting documents.” Mr. Clarkson says that he received the letter on February 26. He responded on March 8, stating, “Unfortunately, I am not the proper authority to consider this appeal.” Mr. Clarkson noted the contracting officer’s direction as to the alternative forums for challenging her decision, and he provided the addresses of the Civilian Board of Contract Appeals and the Court of Federal Claims.

On March 26, 2007, Mr. Owen filed an appeal of the contracting officer’s decision with the Civilian Board of Contract Appeals.

Discussion

USAID has filed two motions regarding this case, one to dismiss for lack of jurisdiction and the other for summary relief. The Board afforded Mr. Owen twenty days in which to respond, and when he failed to file a response, sent him a reminder that one was authorized. Despite the reminder, Mr. Owen has not filed an opposition to either motion.

We grant the agency's motion to dismiss for lack of jurisdiction and consequently have no need to address the merits of the case.

We recently described the law regarding the timeliness of appeals of contracting officers' decisions:

The Contract Disputes Act of 1978, which governs the Board's review of contracting officer decisions, requires that an appeal of such a decision be filed "[w]ithin ninety days from the date of receipt of [the] decision." 41 U.S.C. § 606 (2000). This deadline for filing has been strictly construed by the Court of Appeals for the Federal Circuit because the authorization to make the filing is a waiver of sovereign immunity. A late filing divests the Board of jurisdiction to consider the case on its merits. *D. L. Braughler Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997); *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982); *Tiger Natural Gas, Inc. v. General Services Administration*, GSBCA 16039, 03-2 BCA ¶ 32,321, at 159,910-11.

Robert T. Rafferty v. General Services Administration, CBCA 617, 07-1 BCA ¶ 33,577, at 166,340.

Mr. Owen received the contracting officer's decision he challenges on November 16, 2006. The ninetieth day after that date was February 14, 2007. This appeal was filed on March 26, 2007 -- forty days after February 14. Because Congress has not waived the Government's immunity to late-filed appeals of contracting officers' decisions, we have no jurisdiction to consider this case. *Rafferty*.

We note that prior to the establishment of this Board in January 2007, different boards of contract appeals had different views as to what constitutes a timely filing of an appeal. The General Services Board of Contract Appeals considered an appeal to be timely only if it was filed with the board itself within the ninety-day period, whereas some other boards of contract appeals considered an appeal timely if it was filed, within that period, with the contracting officer for transmission to the board. *Hallwood Plaza, Inc. v. General Services Administration*, GSBCA 16808, 06-2 BCA ¶ 33,299 (citing *S. A. Ludsin & Co. v. Small Business Administration*, GSBCA 14175-C(13777-SBA), 97-2 BCA ¶ 29,185); *Sharp Construction Co.*, DOT BCA 3094, 98-1 BCA ¶ 29,567 (citing *Surety Roofing Contractors*, ASBCA 37894, 89-2 BCA ¶ 21,730). The difference in treatment was dependent on the rules of the board. *Hallwood Plaza*, 06-2 BCA at 165,131.

Even under the more liberal version of the rules, the appeal which was mailed by Mr. Owen within the ninety-day window would not qualify as timely. It was an appeal of USAID's letter of demand, not a contracting officer's decision; it was sent to an agency employee who was not a contracting officer; and it was intended to be decided by that employee, not transmitted to a board. We call attention to the distinction in treatment, however, to note that this Board's newly-published rules are identical to the rules of the former General Services Board in stating that "[a] notice of appeal . . . is filed upon the earlier of its receipt by the Office of the Clerk of the Board or if mailed, the date on which it is mailed." Rule 1(b)(5)(i) (72 Fed. Reg. 36,794, 36,796 (July 5, 2007)). This rule recognizes that the Board is an independent institution and that contracting officers of the various agencies whose disputes are heard here are not agents of the Board. Under the rule, even if Mr. Owen's February 9, 2007, letter had been an appeal of the contracting officer's decision and had been sent to the contracting officer for transmission to the Board, it would not qualify as a timely-filed notice of appeal because it was not filed with the Office of the Clerk of the Board within ninety days after Mr. Owen received the decision.

Decision

The appeal is **DISMISSED FOR LACK OF JURISDICTION.**

STEPHEN M. DANIELS
Board Judge

We concur:

JEROME M. DRUMMOND
Board Judge

H. CHUCK KULLBERG
Board Judge